

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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ACCO BRANDS, INC., f/k/a ACCO USA, INC.,

Plaintiff-Appellee,

v

DEPARTMENT OF TREASURY,

Defendant-Appellant.

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UNPUBLISHED

November 20, 2003

No. 242430

Court of Claims

LC No. 01-018021-CM

Before: Owens, P.J., and Fitzgerald and Saad, JJ.

PER CURIAM.

Defendant, Department of Treasury, appeals by leave granted the portion of the Court of Claims' May 20, 2002, opinion and order denying defendant's motion for summary disposition with regard to two of plaintiff's claims in this Single Business Tax [SBT] case involving tax years 1992 through 1996. We reverse.

Plaintiff is a Delaware corporation with its principal place of business in Illinois. Plaintiff markets office supplies, and employed two Michigan residents as sales representatives to call on customers in Michigan and other states. The orders were sent to plaintiff's home office in Illinois.

Before 1993, defendant published tax bulletin 1980-1 and revenue administrative bulletin 89-46, both of which indicated that businesses like plaintiff's would not be subject to the SBT. However, in 1993, this Court held in *Gillette v Dep't of Treasury*, 198 Mich App 303; 497 NW2d 505 (1993), that the bulletins were not determinative of whether a business was subject to the SBT. In September 1994, defendant sent plaintiff a notice of inquiry regarding plaintiff's liability for the SBT. Plaintiff responded by stating that it did not believe that it was liable for the tax or to file a return.

In February 1998 defendant audited plaintiff for the years in question, and determined that plaintiff was liable for approximately \$167,269.40 in unpaid taxes and interest. Plaintiff paid the amount under protest, and later paid an additional \$945.68 in interest based on defendant's final assessment. Plaintiff then brought suit in the Court of Claims seeking a refund of the entire \$168,215.08 paid, plus interest, costs, and attorney fees.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(8) with regard to all seven claims raised in plaintiff's complaint. On May 20, 2002, the court issued an opinion

and order denying defendant's motion with regard to plaintiff's Commerce Clause claim and laches claim. With regard to plaintiff's claim that defendant violated the Commerce Clause of the United States Constitution by imposing the SBT on plaintiff (Count IV), the court found that "2 part-time sales people do not constitute a substantial nexus for meeting the Commerce Clause standard." With regard to plaintiff's claim that defendant was barred by the doctrine of laches from changing its practices regarding the SBT because plaintiff did not formally change its bulletins regarding the SBT until February 1998 (Count VI), the court determined, without explanation, that plaintiff's laches claim was sufficient to withstand a motion for summary disposition pursuant to MCR 2.116(C)(8).

Defendant first contends that the trial court erred in finding that two employees conducting economic activity in the state is insufficient as a matter of law to satisfy the substantial nexus requirement of the Commerce Clause.

This Court reviews a grant or denial of summary disposition based upon a failure to state a claim de novo on appeal. *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 253; 571 NW2d 716 (1997); *Trost v Buckstop Lure Co*, 249 Mich App 580, 583; 644 NW2d 54 (2002). Summary disposition against a claim may be granted on the ground that the opposing party has failed to state a claim on which relief can be granted. MCR 2.116(C)(8), *Horace v City of Pontiac*, 456 Mich 744, 749; 575 NW2d 762 (1998). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001); *Ormsby v Capital Welding, Inc*, 255 Mich App 165, 172-173; 660 NW2d 730 (2003). All factual allegations in support of the claim are accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the facts, and construed in the light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

In *Magnetek Controls, Inc v Dep't of Treasury*, 221 Mich App 400, 411; 562 NW2d 219 (1991), this Court held that a sufficient nexus "may be manifested by the presence in the taxing State of the vendor's property or the conduct of economic activities in the taxing State performed by the vendor's personnel or on its behalf." *Id.*, quoting *Orvis Co, Inc v Tax Appeals Tribunal of the State of New York*, 86 NY2d 165, 178; 654 NW2d 954 (1995). Here, there is no question that plaintiff maintained two employees in Michigan who regularly conducted economic activities in the state on plaintiff's behalf. Plaintiff admitted in his complaint that it had two resident employees in the state who called on customers in this state and solicited requests for purchases of plaintiff's products. Plaintiff's admission that its physical presence in this state consisted of two employees is sufficient under *Magnetek, supra*, to withstand a Commerce Clause challenge. The trial court clearly erred in finding that the presence of two employees in Michigan could not establish a substantial nexus with the state sufficient to withstand a Commerce Clause challenge. For this reason, the trial court erred in failing to grant summary disposition to defendant on Count IV of the complaint.

Defendant also argues the trial court's decision regarding plaintiff's claim for laches is contrary to this Court's decision in *Speaker-Hines v Dep't of Treasury*, 207 Mich App 84; 523 NW2d 826 (1994). In *Speaker-Hines*, the petitioner argued, in part, that its due process rights were violated because the department and Tax Tribunal delayed over fifteen years in processing and finalizing the assessment. This Court concluded that:

petitioner's due process rights were not violated by the substantial delays in processing and finalizing the assessment. We find no authority to support petitioner's argument that it had a due process right to a speedy adjudication of the tax assessment. Unlike the cases cited by petitioner, petitioner was not deprived of liberty or property without notice and the right to be heard. [*Id.* at 91.]

This Court, noting that "the argument concerning the due process violation also suggests laches as a basis for the abatement of interest," also stated with regard to laches:

In any event, we find the argument without merit because the department was not operating under any time constraints and because petitioner had failed to establish prejudice. [*Id.*]

For laches to apply, plaintiff must prove (1) a lack of diligence on defendant's part and (2) prejudice to the plaintiff. *Jackson v Thompson-McCully Co*, 239 Mich App 482, 494; 608 NW2d 531 (2000). As demonstrated by the plethora of cases following *Gillette*, there were many businesses affected by the decision. The fact that it took defendant three and a half years to get to plaintiff does not demonstrate a lack of due diligence. Furthermore, plaintiff's only claim of prejudice was that it did not get the benefit of the tax status conferred by the tax bulletins in 1994. However, by that time *Gillette* had already been decided, and plaintiff was on notice that the tax bulletins were not determinative with regard to its tax status and it might be liable for the SBT. Further, in *Syntex Laboratories v Dep't of Treasury*, 233 Mich App 286, 289; 590 NW2d 612 (1998), this Court held that *Gillette* applies retroactively because, among other things, taxpayers have no vested right in the continuation of any tax law. The trial court clearly erred in denying summary disposition with regard to Count VI of the complaint.

We reverse the order denying defendants' motion for summary disposition of Counts IV and VI, and remand for entry of an order granting summary disposition to defendant. Jurisdiction is not retained.

/s/ Donald S. Owens  
/s/ E. Thomas Fitzgerald  
/s/ Henry William Saad